

Another Indian case is also in point. This is the case of *Ramachandra Gopalrao v Deputy Inspector General of Police*¹¹ where at pp 132-133 Bhutt J says:

The applicant was never informed of the fact that the record of his past service and previous complaint against him would be taken into account at the time of considering the punishment to be imposed upon him. This should have been done in order to enable the applicant to take a proper defence against the proposed action of dismissal. No doubt competent authorities are entitled to take into consideration the record of the past service of civil servants in order to determine the appropriate punishment.

But before taking this into consideration the civil servant must be apprised of the record of his past service and of the fact that it would be taken into account to decide the question of punishment. In *Gopalrao v State Government of Madhya Pradesh* AIR 1954 Nag 90 (L), the question in what circumstances the record of a civil servant's past services can be taken into account at the time of determining the punishment consequential to the establishment of a charge against him was considered and it was held:

'If the civil servant is not at all apprised of the record of his past service, nor is he informed that it will be taken into account in order to decide the question of punishment, he cannot be deemed to have been given a reasonable opportunity to show cause against the proposed action. Normally, the question of punishment is linked up with the gravity of the charge, and the penalty that is inflicted is proportionate to the guilt.' (The emphasis is ours.)

The case of *Chief Constable of North Wales Police v Evans*¹² shows that the courts consistently apply the same principle as is evident from the passage in the judgment of Lord Hailsham of St Marylebone LC at p 144:

Apart from his self misdirection on the scope of his discretion, in the present case the chief constable clearly admitted in his affidavit that he had taken into account matters concerning the domestic life of the respondent, some of which, if properly put to the respondent, might perhaps, after his explanation had been given and heard, have influenced the decision as to whether the respondent was likely to become an efficient or well-conducted constable. But some of the allegations were plainly erroneous and none, whether erroneous or otherwise, was ever put to the respondent at all in connection with the relevant inquiry, whether at the delegated hearing or otherwise. Moreover, it was conceded by counsel for the chief constable that, at the time of the extremely brief interview at which the decision was made by the chief constable, the chief constable had already made up his mind to dispense with the respondent's services on the basis of the report made to him by the deputy chief constable, and the respondent was given no chance to say anything by way of denial of the facts alleged in the report or in mitigation of them.

Another often quoted case on the same point is the Privy Council case of *Board of Trustees of Maradona Mosque v Badiuddin Mahmud & Anor*.¹³

We wish to add that it has been held that tribunals must not continue privately to obtain evidence or other information between the conclusion of the hearing and

A the making of the decision, without notifying the parties so as to give them an opportunity to make submissions on it. See for example *R v Deputy Industrial Injuries Commissioner, ex p Jones*¹⁴ and *Fairmont Investments Ltd v Secretary of State for the Environment*.¹⁵

B It was manifestly demonstrated to us that the first respondent had infringed the rule of natural justice in not affording the appellant the opportunity to explain or controvert her record of service which played a part in influencing its decision to impose the severest punishment permissible under the 1969 Regulations. On this ground and based on the authorities we have cited in our judgment we have no alternative but to allow this appeal.

C *Appeal allowed.*

Solicitors: *Karpal Singh & Co.*

Reported by *Prof Ahmad Ibrahim*

D

Lye Thean Soo & Ors v Syarikat Warsaw

E

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 410 OF 1985

LEE HUN HOE CJ (BORNEO), HARUN HASHIM AND JEMURI SERJAN SCJJ
17 AUGUST 1990

F

Land Law — Public right of way — Proof of dedication

G

The respondents (plaintiffs) in this case were sand mining and sand contractors. They had entered into agreements with various land owners to mine, work and take away sand from their holdings. Entry to their holdings was by way of an access road on a lot which for many years had been reserved for a road and set aside as such and used by the public. Although the lot of land had been surrendered to the government it had not been taken over by the government. The respondents claimed that the appellants (defendants) had wrongfully and maliciously conspired and combined among themselves to injure their business by obstructing the access road and preventing their lorries and other vehicles transporting sand from going in and out of the holdings. The appellants denied the claim. The appellants had applied for subdivision of the lands in 1957. The third appellant retained the lot of land on which the road was and said he had granted the right of entry to the lot only with his consent. Before the judge of the High Court, two issues were agreed — (i) was the lot a public highway prior to 1957? and (ii) was the lot a public highway after 1957? The learned trial judge gave judgment for the respondents. The appellants appealed.

H

I

Held, dismissing the appeal:

(1) Apart from legislation, dedication is also a method by which a right of way may be created.

(2) In this case the path has been used by the public, particularly those living in the vicinity for many years, even before the third appellant acquired ownership of the land, without interruption. He had taken no steps to ensure that a

public right of way was not so created. The path has been used and enjoyed by the public as a right for so many years openly and without interruption and must be known to the owner of the land.

(3) The respondents were merely using the common law method of establishing a public right of way by proof of dedication. The learned judge was within his right to accept it and there is no reason to interfere with his decision.

[Bahasa Malaysia summary]

Responden di dalam kes ini ialah kontraktor perlombongan pasir. Dia telah membuat perjanjian dengan beberapa pemunya tanah untuk melombong, mengerjakan dan mengeluarkan pasir dari tanah-tanah mereka. Kemasukannya kepada tanah-tanah itu melalui jalan atas satu lot tanah yang telah dirizabkan untuk beberapa tahun sebagai jalanraya dan diperuntukkan untuk tujuan itu dan digunakan oleh orang awam. Sungguhpun tanah itu telah diserahkan kepada kerajaan ia belum diambil alih oleh kerajaan. Responden mendakwa bahawa perayu-perayu telah berkomplot secara haram dengan niat jahat untuk merugikan perniagaan responden dengan menghalang jalan masuk itu dan menahan lori-lori mereka dan kenderaan-kenderaan lain membawa pasir keluar masuk daripada tanah-tanah itu. Perayu telah menafikan tuntutan itu. Mereka telah memohon pecah lot tanah pada tahun 1957. Perayu yang ketiga memegang lot di atas mana jalan itu berada dan ia mendakwa ia telah memberi hak masuk kepada tanah itu hanya dengan izinnya. Di hadapan hakim Mahkamah Tinggi dua isu telah dipersetujui — (i) samada lot itu adalah jalanraya awam sebelum 1957, (ii) samada lot itu adalah jalanraya awam selepas 1957? Hakim yang arif telah memberi penghakimannya bagi pihak responden. Perayu telah membuat rayuan.

Diputuskan, menolak rayuan itu:

(1) Selain daripada perundangan, penyerahan (dedication) juga adalah satu cara yang boleh mewujudkan hak lalu-lalang.

(2) Di dalam kes ini jalan itu telah digunakan oleh orang awam khususnya orang-orang yang tinggal berhampirannya tanpa gangguan untuk beberapa tahun dan sebelum perayu ketiga mendapat hakmilik tanah itu. Perayu ketiga tidak mengambil apa-apa langkah untuk menentukan hak lalu-lalang awam tidak diwujudkan. Jalan itu telah dipakai dan digunakan oleh orang awam sebagai jalan lalu-lalang awam untuk beberapa tahun secara terbuka dan tanpa gangguan dan ini harus diketahui oleh pemunya tanah itu.

(3) Responden telah menggunakan cara di bawah 'common law' untuk membuktikan hak lalu-lalang awam secara penyerahan. Hakim yang arif berkuasa menerima dan mengesahkan perkara itu dan tidak ada sebab mempersoalkan keputusannya.]

Cases referred to

- 1 *Datin Siti Hajar v Murugasu* [1970] 2 MLJ 153 (distd)
- 2 *Goodson v Richardson* (1874) 9 Ch App 221 (refd)
- 3 *R v Pratt* (1885) 4 E & B 860; 119 ER 319 (refd)
- 4 *Harrison v Duke of Rutland* [1893] 1 QB 142 (refd)
- 5 *Hickman v Maisey* [1900] 1 QB 752 (refd)
- 6 *Folkestone Corp v Brockman* [1914] AC 338 (folld)
- 7 *A-G v Esher Linoleum Co Ltd* [1901] 2 Ch 647 (folld)

Appeal from: Civil Suit No 405 of 1975 (High Court, Penang)

Rf Manecksha (Ranjit Singh with him) for the appellants.
Lim Kean Chye for the respondent.

Cur Adv Vult

A **Lee Hun Hoe CJ (Borneo)** (delivering the judgment of the court): This is an appeal against the decision of the late Arulanandom J given on 1 October 1980 on liability and the decision of Edgar Joseph Jr J, given on 31 October 1985 on quantum. The senior assistant registrar assessed damages at \$400,000 as appeared from his certificate dated 21 April 1984. The defendants, consenting to a final order on the application of the plaintiffs incorporating the senior assistant registrar's assessment, Edgar Joseph Jr J, on 10 July 1986 adjudged that the defendants do pay the plaintiffs \$400,000 and costs of the inquiry to be taxed.

C The plaintiffs are in the business of sand mining and sand contractors. They sued the defendants jointly for damages for conspiracy to create a nuisance, that is, to injure them and individually for obstruction. They entered into agreements with various landowners to mine, work, win and take away sand from their holdings. Entry to their holdings was by way of an access road known as lot 1277 which for many years had been reserved for road and set aside as such and used by public as such. Although lot 1277 was surrendered to the government, the government had not taken it over. They claimed that the defendants wrongfully and maliciously conspired and combined amongst themselves, with intent to injure their business, by obstructing the access road and prevented their lorries and other vehicles transporting sand from going in and coming out from their holdings.

F The defendants denied the claim. It appears that Tan Soon Keat, deceased, who was the third defendant at the trial and Chew Eng Eam acquired lot 1239 which had a frontage on Relau Road, Penang to the south of it. Lot 1239 was the result of the amalgamation of lots 69 and 79, Pt I of mukim 13. In 1957 they applied for subdivision of this lot. It was subdivided into 16 smaller lots, namely, lot nos 1255 to 1270 (15 lots) and lot 1277 (1 lot). The subdivision was such that except for subdivided lots 1263 and 1270 they had no road access to Relau Road and it was therefore necessary to provide for such access by the reservation of a strip of land which will provide a frontage for these subdivided lots. The strip of land or path became lot 1277. The third defendant retained lot 1277 and the remaining lots were sold. The first defendant bought lot 1255 and the second defendant lot 1264.

I The third defendant averred that he exercised his right of entry to lot 1277 which he granted to the occupiers of the subdivided lots only with his consent. He further averred that he had no intention of allowing the general public access to the said lot. But the evidence would seem to suggest otherwise. He said after the plaintiffs were denied entry on 4 September 1975, they sought his consent and approval to allow them entry but he refused. As a result, they applied to the Registrar of Lands, Penang and eventually successfully obtained a collector's right of

way on 3 March 1976. Since then he had not interfered with their use of the said lot.

It was suggested that the plaintiffs could have access through lot 353 though it might incur heavy expenses of constructing a road for vehicular traffic. Thus there is no justification for regarding lot 1277 as a way of necessity. The defendants maintained that the access was meant for the subdivided lots and that there never was dedication as a public road.

Before the late Arulanandom J the parties agreed that there were two issues: (i) was lot 1277 a public highway prior to 1957?; (ii) was lot 1277 a public highway after 1957? On the evidence the learned judge gave judgment for the plaintiffs. Unfortunately, he died on 22 February 1982 before he could give a written judgment. It is clear that he answered the two issues in the affirmative. However, before us Encik Manecksha for the defendants disagreed that there were two issues. He said the question was whether there was a cause of action at the time of the issuance of the writ on 13 August 1975. Further, whether the subdivision in 1957 resulted in creating a public right of way in respect of lot 1277. If it did not, then the relevant date is the date of issuance of the writ. It follows that if between 1957 and 13 August 1975 no right of way had been created, then the plaintiffs clearly had no cause of action.

Encik Manecksha submitted that he was entitled to raise the new issues which were never advanced before the learned judge. He said the credibility of the witnesses did not arise. The memorandum of appeal specifies three grounds. The two main grounds of appeal are that the learned judge was wrong to find that lot 1277 was a public highway and that he was wrong in finding that there was a conspiracy to create a nuisance and interfere with the business of the plaintiffs. Having agreed to the two issues before the learned judge it is too late in the day to say that he disagreed with the two issues. The proper time to raise the new issues was before the learned judge. It is not proper for us to consider the new issues for an obvious reason. The evidence adduced before the learned judge was clearly directed to the two issues then being argued and the examination of the witnesses was, no doubt, also directed to those issues as they then stood. In our judgment it would be quite unreal to ask the learned judge to determine the new issues without reopening the whole of the evidence and if necessary giving both sides an opportunity to call further evidence. Moreover, it would not be right for us to determine the new issues without the appropriate finding of facts by a trial court.

We do not agree with the defendants that the credibility of witnesses does not arise. In this case we are not dealing with the question of an easement or the National Land Code 1965. We are concerned, as the learned judge

was, with a situation prior to the coming into force of the National Land Code 1965. The case of *Datin Siti Hajar v Murugasu*¹ which is concerned with the question of easement is not really applicable. The public right of way does not necessarily exist over a road even where the public is in the habit of passing it. The question of what constitutes a public right of way may well come into issue as in this case. The plaintiffs have assumed the responsibility to show that there exists a public right.

A right of way may be described as a right of passing over someone else's property. The right carries with it no interest whatsoever in the soil of the land, which remains the property of the owner, although as was said by Lord Selborne LC in *Goodson v Richardson*² 'he cannot use the soil, or deal with it by breaking it open, or in any other manner, so as to interfere with the use of it...'. The owner of the land over which the way passes is entitled, however, to prevent its surface being used in any manner or for any purpose other than that of passing and repassing.

Rights of way are either public or private. Easement has been loosely and inaccurately used to define a public right of way. Strictly speaking, it is more appropriate to use it in respect of private right, which is an 'easement' or incorporeal right in the nature of a privilege which has been created by grant or by reservation or by prescription. A public right of way lacks the essential requirement of a dominant tenement for the benefit of which the right is exercisable.

Any public right of way of any width may be said to be a highway. The grant of a right of way is merely a right of passing and repassing (whether it be of footway, path, carriageway or otherwise). The public acquires by dedication no right of property in the soil. The owner of the soil, after dedication, retains all his rights in the soil and may exercise those rights just as he pleases so long as he does not interfere with the public right of passing and repassing along the surface. The owner still retains very important advantages. See *R v Pratt*;³ *Harrison v Duke of Rutland*;⁴ and *Hickman v Maisey*.⁵

The plaintiffs have called various witnesses to support their claims. The lack of local authorities is no reason to deter the courts from deciding whether a public right of way exists or not on the evidence adduced.

Haji Karim bin Mohd Hussain (PW2), a retired government servant, stated at p 28 of the appeal record:

...I joined government in 1938. My first job was land bailiff. Covering Relau area. P9 of A2 shown to witness. I knew the area from 1938. It was 69 and 79 Pt 11. It was subdivided in 1956 or 1957. Lot 1277 shows road reserve. There is a Malay kampong. It is on lot 1264, 1265, 1266, 1255, 1251. It is Kampong Paya, Relau. There was a path in 1938 where lot 1277 is. The path comes to Relau Road at the bottom of the plan. The path stops at the boundary of the land then another path goes further into Kampong Paya. The present road

almost takes up the same path in 1938. It was an old path. The path was open to the public until now. No one obstructed the road. In my opinion it was a public road.

Osman bin Din (PW3), a poultry rearer, testified at p 29 of the appeal record:

I use the kampong path. The path has been there all my life. I was born there. The public has been using this road. The path leads up to the hills. There are sand mines up there. Between [19]65 and [19]70 there were sand mines and lorries using this path. Lorries went up and down and there was no trouble. Motorcycle also used the road. Bus Sekolah also go in and out. I've not seen anybody being stopped. I've heard about the plaintiffs being stopped.

Yussop bin Din (PW4), a woodcutter, stated at p 30 of the appeal record:

I stayed in Relau ten years ago. I used to go to Kampong Paya to gather wood. I could go up and down freely without being stopped. Others too were using the road including vehicular traffic...

Mat Ariff bin Shariff (PW6) stated at p 31 of the appeal record:

Born in Relau 65 years, self-employed. Lived there all my life. The road in Kampong Paya is a public road. I have not asked anybody for permission. All manner of vehicles use the road. Outsiders also use the road.

Mat Tuselim bin Kasimon (PW1), the Assistant Collector of Land Revenue, Penang, in answer to the court at p 28 of the appeal record, stated:

...If a plan for subdivision shows an area for road, it should mean that that area is earmarked for a road reserve. The present practice would be not to give the area a number.

The defendants submitted that the word 'reserve' must be given its ordinary meaning. Until the 'reserve' is taken over by the appropriate authority it is only a road for some future use. Without the consent of the owner a person using the road would be a trespasser.

Encik Lim Kean Chye for the plaintiffs pointed out that the issues before the learned judge were agreed by the parties. The laws applicable was the Penang and Malacca Titles Act. It was not dealing with Crown land but freehold and common law rights applied. It was concerned with long user and highway. Public right was in issue, not private right. In respect of highway there must be dedication. The witnesses gave evidence implying that there was dedication. The third defendant did not pay the quit rent until after the dispute arose. He said the Land Office should not have accepted it. It is his submission that where there is dedication the owner cannot withdraw what he has already done.

The plaintiffs have produced a succession of users to entertain the court with their reminiscences. If these were accepted by the court then a prima facie case in favour of dedication would have been established. The question is

A not only whether on the evidence adduced before the learned judge he can determine that there has been an exercise of such a right of way as in this case but also whether he can reasonably infer that the owner has a real intention of dedicating that way to the use of the public. That the answer is in the affirmative is clear when he decided the question of liability in favour of the plaintiffs. B Quite clearly, he was satisfied that a path existed in lot 1277 and frequently used by the public and that the right of way was enjoyed as of right and without interruption over a considerable period until 1975 when the defendants objected to the users. The only defendant who could really object was the third defendant. It was not enough to disprove dedication. The third defendant was under the impression that he was no longer the owner of the land. He even regarded himself merely a nominal owner. C

In *Folkestone Corp v Brockman*⁶ Lord Kinnear laid down the correct method of proving dedication from user in D these words:

Dedication, in my opinion, is a matter of fact.... The nature of user, and consequently the weight to be given to it, varies infinitely in different cases, and whether it will import a presumption of grant or dedication must depend upon the circumstances of the particular case. The law is stated more exactly by Lord Blackburn in *Mann v Brodie* (1885) 10 App Cas 378 at 386. He begins by citing the doctrine laid down by Parke B, in *Pool v Huskinson* (1843) 11 M&W 827; 152 ER 1039: E

'In order to constitute a valid dedication to the public of a highway by the owner of the soil, it is clearly settled that there must be ... an animus dedicandi, of which the user by the public is evidence and no more.' F

And then he adds more particularly with reference to the effect of user, that:

'where there has been evidence of user by the public so long and in such a manner that the owner of the fee, whoever he was, must have been aware that the public were acting under the belief that the way had been dedicated, and has taken no steps to disabuse them of that belief, it is not conclusive evidence, but evidence on which those who have to find that fact may find that there was dedication by the owner, whoever he was.' G

H Public rights of way may arise in two ways. They are either provided for by statute, or they are created by dedication of the soil to the public use by the owner and acceptance by the public. As Buckley J said in *A-G v Esher Linoleum Co Ltd*⁷ as follows:

I In all these cases of right of way it is necessary to remember that the thing to be established is dedication, not user. A highway is not acquired by user.... In most of these cases dedication, it is true, is proved by user. But user is but the evidence to prove dedication; it is not user, but dedication which constitutes the highway;...

In our judgment, apart from legislation, dedication is also a method by which a right of way may be created. It must be remembered that mere public user does not create a

highway. The foundation of public right lies in dedication and dedication presumes a dedicator who in this case can only be the owner of the land over which the right of way has been granted. In the absence of any definite proof of actual and deliberate dedication the courts are entitled to adopt the legal fiction of assuming dedication from proved facts.

The defendants denied dedication. It is said that the third defendant merely granted the use to a limited number of persons, that is, those who bought the lots after the subdivision and that he had no intention to dedicate to the public. Nevertheless, the path has been used by the public, particularly those living within the vicinity, for many years even before he acquired ownership of the land without interruption. He has in fact taken no step to ensure that a public right of way is not so created. The path has been used and enjoyed by the public as a right for so many years openly and without interruption and must be known to the owner of the land.

The plaintiffs are merely using the common law method of establishing a public right of way by proof of dedication. The learned judge was within his right to accept it, and we see no reason to interfere with his decision. Accordingly, we would dismiss the appeal with costs. Deposit to the plaintiffs to account of taxed costs.

Appeal dismissed.

Solicitors: Jagjit Singh & Co; Lim Kean Chye & Co.

Reported by Prof Ahmad Ibrahim

A Ng Tien & Anor v Chow Nim Yan

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-207 OF 1989
LEE HUN HOE CJ (BORNEO), HARUN HASHIM AND JEMURI SERJAN SCJJ
14 JULY 1990

B *Societies — Trust — Whether plaintiffs had capacity to sue as trustees of society — Whether land held in trust for society — Constructive trustees*

Trusts and Trustees — Constructive trust — Whether land held in trust for society

C This was an appeal from the decision of the High Court by the appellants purporting to act as trustees of a society. The High Court had dismissed the appellants' claim for a declaration that a piece of land was held by the respondent as trustee for the society and for an order that the land be transferred to the names of the appellants as trustees and other consequential orders. In the High Court the learned judge confined himself to two issues only, whether the plaintiffs-appellants had the capacity to sue as trustees of the society and secondly whether the defendant-respondent held the property in trust for the society. The learned judge held that the plaintiffs had failed to prove their case on the two issues and dismissed the claim. The appellants appealed.

Held, allowing the appeal:

E (1) The learned judge's approach to the first issue was solely based on the legal position excluding altogether the position of the appellants from the standpoint of equity. Even if the appellants were not properly elected in accordance with the Rules of the society, the court, if at all necessary, may yet intervene to raise a constructive trustee for equity does not want for a trustee. If the trustees who were elected at a committee meeting could be made liable or accountable to the society it is axiomatic that they should be capable of suing as well. The appellants are therefore constructive trustees for the society for the purpose of the action.

G (2) The appellants in the court below had produced overwhelming incontrovertible contemporaneous documentary evidence to prove that the land in question from the time the society was established and thereafter had always been regarded as the property of the society. In this case quite clearly a trust has been established as evidenced by the various documents and exhibits produced in the court below and not by a trust deed that the learned judge in the High Court looked for. On the true perspective of the documentary evidence and applying the principles enunciated in *Soar v Ashwell*,⁵ *Rochefoucauld v Boustead*⁴ and *Wan Naimah v Wan Mohamed Nawawai*,³ the court was satisfied there was a trust in respect of the land and that the respondent held the land in trust for the society.

[Bahasa Malaysia summary]

I Ini adalah rayuan dari keputusan Mahkamah Tinggi yang dibawa oleh perayu yang mendakwa mereka pemegang amanah sebuah syarikat. Mahkamah Tinggi telah menolak permohonan perayu untuk deklarasi bahawa tanah yang berkenaan dimiliki oleh responden sebagai pemegang amanah syarikat itu dan permohonan supaya tanah itu dipindahmilik ke nama perayu sebagai pemegang amanah dan perintah-perintah berbangkit. Di Mahkamah Tinggi hakim yang arif membincangkan dua isu, iaitu samada plaintiff-perayu mempunyai keupayaan membuat tuntutan sebagai pemegang amanah dan yang kedua samada defendan-responden memegang harta itu sebagai amanah untuk syarikat it. Hakim yang arif berpendapat plaintiff telah gagal membuktikan tuntutan